NLRA AND EMPLOYEE FREEDOM OF SPEECH

by

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I. NLRA FINDS FACEBOOK POSTING TERMINATION LAWFUL … BUT UNRELATED HANDBOOK POLICIES OVERLY BROAD

In Karl Knauz Motors Inc., (NLRB ALJ, No. 13-CA-46452), a National Labor Relations Board ("NLRB") administrative law judge (ALJ) found that Knauz BMW lawfully terminated the employment of Robert Becker, a salesperson, after he posted pictures and comments on his Facebook page about two different workplace incidents -- an automobile accident and a dealership sales event. The judge also found that several Employee Handbook policies, unrelated to social media postings, contained overly broad language.

The first incident Becker posted on his Facebook page concerned an accident at a Land Rover dealership also owned by Knauz on an adjacent property. Becker posted pictures of the accident, as well as comments such as, "This is your car: This is your car on drugs."

The same day, Becker also posted pictures of a dealership sales event. Becker and other salespersons disagreed with the General Sales Manager's choice of food and beverages for the event, including hot dogs and chips. Becker posted pictures of the other salespersons with the food and beverages, as well as several comments on his Facebook page, such as:

> "The small 8 oz bag of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch…but to top it all off…the Hot Dog Cart. Where our clients could attain a over cooked wiener and a stale bunn [sic]…"

Although both posts were made on the same day, managers of the dealership testified that Becker's employment was terminated because "[he] had satirized a very serious car accident that occurred at our Land Rover facility on his Facebook page by posting pictures of the accident accompanied by rude and sarcastic remarks about the incident."

The ALJ held that the termination for the posting of the accident was lawful because the posting did not amount to protected or concerted activity under the National Labor Relations Act ("NLRA"). Rather, Becker posted it "apparently as a lark, without any discussion with any other employee of the Respondent and [it] had no connection to any of the employees' terms and conditions of employment."

On the other hand, the ALJ opined that had the dealership terminated Becker's employment for the Facebook postings regarding the **sales event**, the termination would have been unlawful. According to the ALJ, the sales event posting constituted protected concerted activity that could have affected Becker's compensation. Although it would be unlikely, a customer may have been "turned off" by the food offered at the event and may not have purchased a car or may have given the salesperson a lower rating.

Further, Becker and another salesperson both spoke up during a meeting about what they considered to be the inadequacies of the food being offered at the event and salespersons also discussed the subject after the meeting. Although only Becker complained about it on his Facebook page, the ALJ equated Becker's posting to an individual employee bringing a group complaint to the attention of management, which is protected concerted activity. The ALJ concluded, however, that Becker had been terminated for the first, unprotected posting and not the second, protected posting.

The ALJ then considered charges regarding certain policies in the dealership's Employee Handbook. The ALJ upheld the dealership's "Bad Attitude" policy, which mandated that employees "display a positive attitude toward their job" because it protected the relationship between the dealership and its customers.

The ALJ held, however, that a policy entitled "Courtesy," which prohibited employees from being "disrespectful," was overly broad, as "[d]efining due respect, in the context of union activity, seems inherently subjective." The ALJ also held that two other policies entitled, "Unauthorized Interviews," and "Outside Inquiries Concerning Employees" were also overly broad as employees "would not be able to discuss their working conditions with union representatives, lawyers or Board agents."

Although the dealership previously notified its employees that the Employee Handbook policies at issue were rescinded and the dealership did not commit any other unfair labor practices, the ALJ nonetheless held the rescission to be insufficient. The ALJ faulted the employer for not providing further explanation about the rescission to its employees and found the rescission inadequate to inform employees that the dealership would not interfere with their rights. The dealership was ordered to post a notice informing employees of their rights to form, join or assist a union, among other things, and that the dealership would not interfere with employees' rights.

Although the ALJ upheld the employment termination, this case provides examples of what may be considered to be protected, concerted activity under Section 7 of the NLRA, in connection not only with social media policies and practices, but Employee Handbook policies in general.

Also …

In Fresenius USA Manufacturing, Inc., 358 NLRB No. 138, a pro-union employee anonymously wrote offensive and possibly threatening statements on several union newsletters left in an employee break room in an attempt to encourage fellow employees to support the union in an upcoming decertification election. The Board unanimously found, in agreement with the administrative law judge, that the employer lawfully investigated the statements and questioned the employee.

However, the Board also unanimously found, in agreement with the judge, that the employer unlawfully admonished the employee not to speak about the investigation with other employees.

A Board majority, consisting of Members Griffin and Block, further found, in disagreement with the judge, that the employer unlawfully suspended and terminated the employee. The majority believed that the employee's written statements did not lose the protection of the Act under either Atlantic Steel or a totality of the circumstances analysis. The majority also believed that the employee's false denials of authorship during the investigation could not serve as a lawful justification for suspension and discharge because, under the circumstances, the employee could not be forced to disclose his protected conduct.

Dissenting in part, Member Hayes found that the written statements were so offensive that they lost the protection of the Act. He further found that an employee does not have a Section 7 right to lie during a lawful interrogation about alleged sexual harassment in order to conceal participation in union activity. However, inasmuch as he found that the employer lawfully discharged the employee for his written statements, Member Hayes believed that it was unnecessary to pass on whether the employee's untruthful responses were a legitimate independent basis for his discharge.

II. ACTING NLRA GENERAL COUNSEL (AGC) RELEASES REPORTS ON FREEDOM OF SPEECH

Clearly, the area of social media has gained a significant amount of attention over the last few months. As a result, the Acting General Counsel (AGC) of the NLRB has issued a report on August 18, 2011 to summarize the positions the AGC has taken.

The report describes the facts of cases where the AGC has issued a complaint against an employer for an alleged violation of the NLRA. The report also describes cases where the AGC declined to issue a complaint. The conduct that has been the target of the AGC's enforcement attention includes both employment actions against employees (terminations, for example) who have posted certain content on a social media platform as well as the employer's policy language that regulates such employee conduct.

The report is quite lengthy, running in excess of 20 single-spaced pages. Some of the employer conduct the AGC found to violate the law is summarized below:

- Terminating an employee who, among other things, referred to the owner of the company as "such an asshole." The owner then threatened to sue that same employee.
- Terminating an employee who, among other things, called her supervisor a "scumbag."
- Terminating an employee for posting pictures of, and sarcastic comments about, the food and drink served by a luxury car dealership during the introduction of a new car model.
- Maintaining a policy that prohibited "rude and discourteous behavior."
- Prohibiting "inappropriate discussions" between employees about the employer.
- Prohibiting employees from using the employer's name, address, and other information in their personal profiles in social media sites.

On the other hand, some examples of employer conduct the AGC found not to violate the NLRA included:

- Terminating a bartender who posted a comment on Facebook about the employer's tipping policy in response to an inquiry from a nonemployee. This employee also referred to customers as "rednecks" and indicated he hoped they choke on glass as they drove home drunk.

- Terminating an employee of a medical transportation company for posting comments on her U.S. Senator's Facebook "wall" that disparaged the services her employer provided and disclosing information about a particular medical call to which the employer had responded.

- Disciplining a retail store employee who complained about "tyranny" from his store management, used a derogatory term to describe his assistant manager, and complained about being "chewed out" for mispriced or misplaced merchandise.

- Maintaining a policy that prohibited employees from pressuring their coworkers to "friend" or otherwise connect with them via social media.

Labor relations professionals should keep the following points in mind in light of the AGC's report:

- Whether or not a violation of the NLRA exists is a very fact intensive question. Each employment action and each policy must be examined in context. The difference between legal and illegal employer conduct in this area can be difficult to identify.

- What an employer's policy says and how it could be read by a reasonable employee is critical. Care should be taken when drafting employment policies to avoid overly broad or ambiguous words and phrases.

- Also, all of the AGC's actions here rest upon the right of employees to engage in protected and concerted activity regarding their "wages, terms and conditions of employment," which can touch on the vast majority of speech that employees decide to engage in.

The AGC's second report, which was issued on January 24, 2012, focuses significant attention on:

- Whether employees who use social media to comment on various work-related issues constitutes concerted protected activity and

- Whether employer policies seeking to impose limitations on an employee's ability to comment on work-related issues are overly broad or could reasonably be interpreted to prohibit comment on Section 7 protected speech.

Some of the more noteworthy highlights in the report are summarized below.

Of the 14 cases briefed in the AGC's report, seven of them address whether employer policies limiting employee communications are overly broad. In five of the seven cases, the AGC determined that the following policy language was overly broad and thus unlawful:

- Employer rule prohibiting "making disparaging comments about the company through any media, including online blogs,"

- Employer rule that employee discussion of terms and conditions must be in an "appropriate" manner, without defining "appropriate,"

- Employer work rule prohibiting "insubordination or other disrespectful conduct" and "inappropriate conversation," and

- Employer policy prohibiting disclosure of confidential, sensitive or non-public information concerning the company without further definition.

However, in two of the cases analyzed, employer social media policies withstood scrutiny where the employer's rule specifically listed plainly egregious conduct that was prohibited (vulgar, obscene, threatening, intimidating, harassing, and/or unlawful discriminatory comments) and limited employee disclosure of confidential information to matters protected by federal law, like securities or health information laws.

Eleven of the 14 cases summarized by the AGC addressed whether an employee was properly terminated because of on-line forum posts. In five of the 11 cases, the AGC determined that the employee was discharged for engaging in protected concerted activity:

- Employee initiated Facebook discussion because employer transferred her to a less lucrative position, which included discussion of potential for class action lawsuit;

- Employee posted comments on Facebook complaining about being reprimanded for her involvement in fellow employees' work-related problems;

- Employee posted message on Facebook about the promotion of a coworker she believed to be unfair; post led to three responses from co-worker "friends" discussing the promotion and mismanagement concerns;

- Employee engaged in Facebook conversation with other employees concerning negative attitude of Operations Manager and "drama" he caused at work; and

- Employee made numerous on-line posts related to labor issues, unfair labor practice charges filed, and critical of employer's management style, which elicited supportive responses from numerous employees.

On the other hand, in six of the 11 cases, the AGC found that the employee was not unlawfully terminated for engaging in the following types of conduct. For example:

- Employee Facebook posts griping about her supervisor reprimanding her for failing to perform a task she was not instructed to perform;

- Employee Facebook post complaining about her coworker's job performance where it had a very limited connection to the terms and conditions of her employment;

- Employee's angry, profane comments on Facebook ranting against her coworkers that they blamed her for everything and she hated them.

- Employee Facebook post that her coworker's annoying habit was driving her nuts and she was "about to beat him with a ventilator."

HR professionals should continue to keep several points in mind when attempting to determine the landscape of social media cases in light of the AGC's August 2011 and January 2012 reports:

- The AGC's reports only summarize conduct that the AGC *believes* violates the law. Until the complaints make their way to the NLRB, it is unknown whether the NLRB will agree with the AGC's conclusions;

- Whether a violation of Section 7 exists is an extremely fact intensive question. Each employment action and policy must be examined on its own set of facts and circumstances; and

- Employer policies regarding employee conduct and use of social media should be crafted from the perspective of what conduct a "reasonable" employee would understand as being limited. Policies restricting employee posts should avoid overly broad language, ambiguous words, and undefined terms.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott Warrick specializes in working with organizations to ***prevent*** employment law problems from happening while improving employee relations. Scott uses his unique background of **LAW** and **HUMAN RESOURCES** to help organizations get where they want to go.

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